APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED, ENTERED AND FILED FEBRUARY 16, 2001

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-14393

District Court Docket No.
95-00269-CIV-T-21B

EL SHAHAWY,

-

Plaintiff-Appellant,

MARILYN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached 11th Cir. R. 36-1 affirmance without opinion, included herein by reference, is entered as the judgment of this Court.

Entered: February 16, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED OCTOBER 7, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NUMBER: 95-269-CIV-T-21B

MAHFOUZ EL SHAHAWY,

Plaintiff,

VS.

MARILYNN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, AND THE SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendants.

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered for Attorney's fees and Other Expenses against Plaintiff and in favor of the following Defendants in the following amounts:

in favor of Defendant Sarasota County Public Hospital Board in the amount of $185,000.00 in attorney's fees and $25,000.00 in 42 U.S.C. § 1988(c) expert fees;

in favor of Defendant Richard Nash in the amount of $36,250.00 in attorney's fees;

in favor of Defendant Phyllis Cobb in the amount of $36,250.00 in attorney's fees;

in favor of Defendant Martin Moss in the amount of $36,250.00 in attorney's fees;

in favor of Defendant Ruth Hochman in the amount of $36,250.00 in attorney's fees;

and in favor of Defendant Marilynn J. Lee in the amount of $50,000.00 in attorney's fees.

October 7, 1999

RICHARD D. SLETTEN, CLERK

BY s/ DF DeNicola
Deputy Clerk

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED APRIL 22, 1999 AND FILED APRIL 23, 1999

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO 95-269-CIV-T-21-B

MAHFOUZ EL SHAHAWY,

Plaintiff,

v.

MARILYNN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, AND THE SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendants.

ORDER

This cause comes before the Court on Defendants' Motions for Determination of Entitlement to Attorney's Fees and Costs (Dkts. 278, 279, & 280) and Plaintiff's Memorandum (Dkt. 285) in opposition thereto, as well as Defendants Sarasota County Public Hospital and Marilyn J. Lee's Motions to Strike (Dkts. 286 & 287) and Plaintiff's Opposition (Dkt. 291) thereto.

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I. Background

The following is a brief summation of the facts and procedural history of this case. The full background of this case is set forth in the Court's 48-page summary judgment Order, its 26-page Order (Dkt. 275) setting forth findings of fact and conclusions of law, and the over 120 other pages of written Orders issued by the undersigned in the course of this case.

Since approximately 1980 and continuing through 1995, Plaintiff Mahfouz El Shahawy, M.D., a cardiologist, has been engaged in litigation with the Sarasota County Public Hospital ("SCPH"), its Board members ("the Board"), and other physicians who practiced and/or served on various administrative committees at SCPH. The primary motivation for that litigation was SCPH's revocation of, and subsequent refusal to reinstate, Plaintiff's privileges to practice at SCPH.

In 1991, Plaintiff resubmitted an application for privileges to practice at SCPH; his application was considered pursuant to the then-applicable SCPH By-laws, which provided a multi-step process of sequential consideration by several hierarchically arranged SCPH committees and entities. Initially, Plaintiff's application received a favorable recommendation; however, partway through the process, the recommendations became negative based on Plaintiff's argumentative and disruptive conduct before certain of the committees. Plaintiff responded by filing a state court damages suit against the Board. When the Board ultimately denied his application, Plaintiff filed a second state court suit seeking a writ of certiorari to review the Board's

decision. These state court cases were combined and mediated, resulting in a settlement agreement between the parties. The three main components of this agreement were: Plaintiff executed a release of all parties; the Board paid Plaintiff $500,000.00; and the Board agreed to reconvene consideration of Plaintiff's application midway through the process, but under a modified version of the scheme set forth in the SCPH Bylaws.

As with the consideration of Plaintiff's application originally in 1991, this modified scheme initially produced a favorable recommendation of Plaintiff's application. However, at the final meeting at which the full Board considered Plaintiff's application, Plaintiff became disruptive and threatened the Board. The Board thereafter denied Plaintiff's application. Relying in part on Plaintiff's conduct before them, the Board concluded that Plaintiff posed a threat to the provision of patient care at and otherwise to the smooth operation of SCPH. Thereafter, Plaintiff filed the instant suit alleging various civil rights violations (based primarily on his Egyptian descent and national origin, but also on the exercise of his First Amendment rights and general due process theories), as well as state law contract and tort claims.

Specifically, in his original Complaint, (Dkt. 1), Plaintiff asserted the following claims:

- Count I against the Individual Defendants for discrimination in violation of 42 U.S.C. §§ 1981 (a) and 2000d-4a, and conspiracy to interfere with civil rights in violation of 42 U.S.C § 1985(2),(3);

- Count II against the Board for denial of due process, based on its alleged failure to follow the terms of the settlement agreement;

- Count III against the Board for discrimination/ retaliation against Plaintiff because of his exercise of his First Amendment rights;[1]

- Count IV against the Board for denial of benefits and participation in a federally assisted program on account of national origin in violation of 42 U.S.C. § 2000d-4a;

- Count V against the Board for breach of contract, based on its alleged failure to follow the terms of the settlement agreement; and

- Count VI against the individual Defendants: unlawful interference with Plaintiff's contractual rights in the settlement agreement.

As the foregoing shows, Plaintiff's theories were several. But the core of his Complaint, both factually and legally, was the assertion that the individual Defendants bore

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1. Throughout this case the Court and the parties have referred to this claim as the "First Amendment claim." Although the freedoms and guarantees of the First Amendment were clearly the asserted basis for this claim, it is clear that this was, in fact, a claim made pursuant to 42 U.S.C. § 1983, which provides a remedy for violations of constitutional rights. Nevertheless, to maintain consistency and avoid confusion, the Court will continue to refer to this claim as the "First Amendment claim."

prejudice against Plaintiff because of his Egyptian descent and national origin and thus conspired to, and did in fact, deny his privileges application. Inter alia, Plaintiff alleged that Defendants conducted secret meetings, altered the minutes and other records of the Board, attempted to manipulate a Board member in her deposition testimony in the state court suits, made denigrating references to Plaintiff's national origin at an executive session of the Board, and generally committed other acts to carry out their plan.

By Order (Dkt. 35) of July 25, 1995, as subsequently clarified by Order (Dkt. 63) of September 29, 1995, the Court, inter alia, dismissed Counts II and VI with prejudice, dismissed portions of Count I with leave to amend, and denied the individual Defendants' motion to dismiss Count I on the basis of qualified immunity. Defendants filed an interlocutory appeal of this Order. By its decision (Dkt. 133) of September 25, 1996, the Eleventh Circuit reversed this Court's denial of qualified immunity to individual Defendants on the § 2000d-4a portion of Count I and otherwise affirmed.

After the initial Order on the motions to dismiss but prior to the above interlocutory appeal, Plaintiff filed his Amended Complaint (Dkt. 40), asserting the following claims:

- Count I against the individual Defendants for violations of 42 U.S.C. §§ 1981(a), 2000d-4a, 1985(2) & (3);

- Count II against the Board for denial of due process, based on its alleged failure to follow the terms of the settlement agreement;[2]

- Count III against the Board for retaliation against the Plaintiff as a result of exercise of his First Amendment rights;

- Count IV against the Board for violation of 42 U.S.C. § 2000d-4a; and

- Count V against the Board for breach of contract.

By Order (Dkt. 157) of December 13, 1996, the Court considered the Defendants' summary judgment motions and granted summary judgment only as to a portion of Count V; otherwise the Court denied Defendants' motions. However, in that Order, as regards the remaining civil rights claims, and particularly as regards the § 1985 claims, the Court noted the very few, highly generalized bits of evidence which, when taken in the light most favorable to Plaintiff barely created a genuine dispute on the critical issue of intent. The Court expressly warned Plaintiff that he had escaped summary judgment "by the narrowest of margins."

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2. Plaintiff reasserted this claim in his Amended Complaint because at the time he filed such pleading, the Court had not yet issued its Order (Dkt. 63) of September 29, 1995, clarifying to the parties that the Court's Order (Dkt. 35) of July 25, 1995, had in fact dismissed Count II of the original Complaint with prejudice.

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Following the Court's reconsideration of the said Order and granting of summary of summary judgment in favor of the individual Defendants on the § 1981 portion of Count 1, as well as the pre-trial ruling that the Board was immune from liability for damages as to Count V, this case proceeded to trial on the following claims:

- Count I against the individual Defendants for violations of 42 U.S.C. §§ 1985(2) & (3);
- Count III against the Board for retaliation against the Plaintiff as a result of exercise of his First Amendment rights;
- Count IV against the Board for violation of 42 U.S.C. § 2000d-4a; and
- Count V against the Board for breach of contract.

At trial, following the close of Plaintiff's case-in-chief, the Court granted the Defendants' motions for judgment as a matter of law, pursuant to Rule 50(a), as to Counts I, III, and IV: the § 1985, § 2000d, and First Amendment claims. Specifically, the Court held that the evidence presented at that time was insufficient to state a prima facie case of a violation of Plaintiff's rights under § 1985, § 2000d, or the First Amendment.

In general, the Court found that evidence supporting such claims was "wanting" — that the Plaintiff had done little more than point to the fact that he is of Egyptian ancestry,

that his application was denied, and that all of the Board members voted against him, and attempted to force the inference that such was a result of a wide-ranging conspiracy. Specifically, as regards the § 1985 claims, the Court found that the evidence was lacking regarding: (1) a conspiratorial agreement, (2) the individual Defendants' joinder or participation in such agreement; and (3) the existence of an invidiously discriminatory animus based on race or another recognized class. Further, the Court noted that the evidence clearly established the Board's reasonable, non-discriminatory basis for denying Plaintiff's application and that the Board would have reached the same decision that they did, in fact, reach, no matter whether the allegedly improper considerations were factored into the decision to deny Plaintiff's application. Lastly, the Court held that Plaintiff failed on his civil rights claims because the testimony of alleged slurs and epithets on which he relied to establish the invidiously discriminatory animus required for those claims was wholly lacking in one of several ways: the witness was unable to give attribution; the witness was vague as to the specifics of the remarks either as to time or content or both; or the remarks heard did not necessarily carry with them the putative discriminatory animus.

Based on the pre-trial ruling that the Board was immune from liability for damages as to Count V, with the dismissal of Counts I, III, & IV, and, after hearing from the parties, the Court discharged the jury. The trial proceeded thereafter to the Court on Count V only. Thereafter, by Order (Dkt. 275) of July 16, 1998, the Court set forth its Rule 52 findings of fact and conclusions of law, and concluded that the Board had not breached the contract. Based on that ruling,

as well as the Rule 50 rulings at trial, the Court directed the Clerk to enter judgment in favor of Defendants on all counts of the Amended Complaint.

II. Costs Pursuant to 28 U.S.C. §§ 1821 and 1920

Part II of Defendant Board's instant Motion (Dkt. 278) sets forth those costs it seeks to recover Pursuant to Rule 54(d)(1), Federal Rules of Civil Procedure, and 28 U.S.C. §§ 1821 and 1920; attached as Exhibit A thereto is its proposed Bill of Costs.[3] While Defendant Board's motion includes extensive documentation of and provides legal authority for those costs it seeks to recover, Plaintiff's memorandum states only the following in response thereto:

> Dr. Shahawy hereby objects to the reasonableness of the costs identified in Defendants' Bill of Costs.

(Dkt. 285 at p.8). Such a vague assertion does not even make clear whether Plaintiff is objecting to the recovery vel non of such items, merely their amounts, or both.

Recently, when presented in another case with a similar sweeping, non-specific objection to a supported, itemized Bill of Costs filed with the Court, the undersigned ruled that such a vague, unsupported objection was insufficient, for

> [n]ot only is such a violation of Local Rule 3.01 [(b), requiring parties who oppose a motion to file

3. As the Defendant Board's proposed Bill of Costs clarifies, said bill sets forth the costs of all Defendants.

> a supporting brief with citation of authorities], it also improperly shifts to the Court the burden of researching and supporting, where possible, Plaintiffs' . . . arguments. Such is not the obligation of this Court in our adversary system. Plaintiffs have not even cited the relevant statutory language, *see* 28 U.S.C. §§ 1821, 1920, . . . nor have they cited any of the caselaw interpreting and applying those sections, *see, e.g., Desisto College, Inc. v. Town of Howey-in-the-Hills*, 718 F. Supp. 906, 911 (M.D. Fla. 1989) (analyzing, discussing, and applying §§ 1821 and 1920), *aff'd*, 914 F.2d 267 (11th Cir. 1990) (table). Plaintiffs' [o]bjections . . . will thus be overruled.

John R. Staib et al. v. Preprint Publishing Co., Inc., et al., Case No. 96-455-CIV-J-21-C (M.D. Fla. November 5, 1998). The same ruling is appropriate in this case. Accordingly, the Court will direct the Clerk to tax in full the Bill of Costs tendered by Defendant.

III. Attorney's Fees Pursuant to 42 U.S.C. § 1988

A. The Standard

By the instant motions, Defendants also seek to establish their entitlement to recover their fees incurred in defending Plaintiff's civil rights claims, pursuant to 42 U.S.C. § 1988(b). Said section provides, in pertinent part, as follows:

> In any action or proceeding to enforce a provision of sections 1981, . . . 1993, [or] 1985 . . . of this title, . . . [or] title VI of the Civil Rights Act of

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> 1964 [42 U.S.C. § 2000d et seq.) . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

It is well established that in order to recover attorney's fees, at least in part, under§ 1989(b) a prevailing plaintiff must merely prevail in part, *see generally Hensley v. Eckerhart*, 461 U.S. 424 (1983), while a prevailing defendant must meet a higher standard, discussed below, in order to recover any fees at all.

As first enunciated by the Supreme Court as regards Title VII in the case of *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), which standard was made applicable to § 1988(b) in the case of *Hughes v. Rowe*, 449 U.S. 5 (1980), in order to recover under § 1998(b), a prevailing defendant must show that the plaintiff's claims were "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *See Christianburg*, 434 U.S. at 422.[4]

In *Sullivan v. School Bd. of Pinellas Cnty.*, 773 F.2d 1182 (11th Cir. 1985), the Eleventh Circuit set forth several suggested factors to aid in determining whether a plaintiff's claim is frivolous under the *Christianburg* standard. These factors include:

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4. The Eleventh Circuit has since stated that the legal standard for determining the frivolousness of a plaintiff's suit is coterminous with the legal standard for determining whether that suit was unreasonable or without foundation. *See Walker v. Nationsbank of Florida, N.A.*, 53 F.3d 1548, 1558-59 n.15 (11th Cir. 1995).

(1) whether the plaintiff established a prima facie case;

(2) whether the defendant offered to settle; and

(3) whether the trial court dismissed the case prior to trial or held a full blown trial on the merits.

Sullivan, 773 F.2d at 1189.

Additionally, the Court in *Sullivan* stated that the above factors were only general guidelines — not hard and fast rules — and stressed that determinations regarding frivolity are to be made on a case-by-case basis. *See id.* However, as a general principle, the *Sullivan* Court noted that frivolous cases were typically those in which a verdict had been directed in favor of the defense at the close of the plaintiff's case-in-chief. *See id.*[5]

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5. In *Sullivan*, the Court referred specifically to "a motion for summary judgment or a Fed. R. Civ. P. 41(b) motion for involuntary dismissal." *Sullivan* involved a non-jury trial at the district court level. As noted by the individual Defendants, during the time of the district court decision and Eleventh Circuit opinion in *Sullivan*, Rule 41 (b) provided the mechanism for a district court to grant a directed verdict in favor of the defendant at the close of the plaintiff's case-in-chief in a non-jury trial. It is thus clear that, although speaking specifically to the facts of the case before it, by their general reference to Rule 41(b) in the *Sullivan* decision, the Eleventh Circuit was referring to the granting of a directed verdict in favor of the defendant at the close of the plaintiff's case-in-chief, prior to the submission of the case to the trier of fact, be it a judge or jury.

While proof of a plaintiff's subjective bad faith is not a prerequisite to a fee award against him, *see Christianburg*, 434 U.S. at 421, "[a] finding of actual bad faith constitutes a basis for an attorney's fee award regardless of the *Sullivan* factors," *Turner v. Sungard Bus. Sys., Inc.*, 91 F.3d 1418, 1422 n.6 (11th Cir. 1996).

B. Discussion of Sullivan Factors

1. *Whether Plaintiff Established a Prima Facie Case*

Based on the Court's January 15, 1997, directed verdict in favor of Defendants on the remaining civil rights claims, the Defendants argue that Plaintiff failed even to establish a prima facie case and thus they assert that this factor weighs in favor of a fee award. Plaintiff counters flatly that he did establish a prima facie case, arguing that his "claims withstood the test of Defendants' motions for summary judgment, and proceeded to trial on the merits where they were supported by admissible evidence." Plaintiff then recounts a short narrative, part of which includes matters irrelevant to this case (his practice at another hospital in Sarasota and career achievements otherwise) and part of which includes facts contrary to those now established in this case (generally that the settlement agreements were breached).[6]

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6. It is within this narrative that Plaintiff also makes the first of the assertions of his memorandum that prompted the Defendants' motions to strike. Specifically, Plaintiff asserts that "During 23 years of clinical practice, Dr. Shahawy has never had a malpractice claim, although a majority of the physicians on staff have either had such

(Cont'd)

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While the fact that a plaintiff's claims survived summary judgment could be relevant in deciding whether to award fees to a defendant in certain cases, such fact would only properly be considered in a case in which the plaintiff's claims easily withstood summary judgment. But such was not the instant case, in which the Court's summary judgment order expressly warned that Plaintiff's claims survived summary judgment by the narrowest of margins, pointing out the very weak evidentiary basis of his claims.

In any event, Plaintiff herein misapprehends the plain words of *Sullivan* when he asserts that the fact that his claims survived a motion for summary judgment means that he *established* a prima facie case; it does not. In this case, Plaintiff's survival of summary judgment meant simply that all of the cold, record evidence presented to the Court at that time, when taken in a light most favorable to Plaintiff, established a dispute as to an issue of fact material to his claims; however, such ruling did not establish those claims or any element thereof. Further, at the close of Plaintiff's

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a claim or otherwise been subject to discipline for alcohol, emotional, or chemical dependency problems." (Dkt. 285 at 4). When Defendants challenged this assertion, Plaintiff responded as follows:

> Upon reviewing th[is] contention, Dr. Shahawy withdraws the word "majority," but still maintains that a number of physicians on the staff have been sued for malpractice or been subject to discipline.

(Dkt. 291 at 1). In support of this assertion, Plaintiff refers only generally to his and another witness' "testimony at trial and/or deposition testimony."

case-in-chief, the Court expressly held that Plaintiff had failed to establish a prima facie case as to this § 1985, § 2000d, and First Amendment claims, and thus granted a directed verdict in favor of Defendants. This factor thus weighs very strongly in favor of a fee award.

2. *Whether Defendants Offered to Settle*

Defendants make the somewhat off-point assertion that Plaintiff never made a settlement offer that "reflected the weakness of his case," but make no mention of any settlement offers that they made. In his memorandum, Plaintiff responds that Defendants offered to settle this case for $2,500,000.00. Defendants challenge this assertion in their motions to strike, asserting that "no such offer was made to settle this case." Plaintiff responds that such an offer was in fact made, and in his response to the motions to strike tenders a draft settlement agreement, Exhibit 1 thereto. However, review of that exhibit reveals only the following language:

> Dr. Shahawy has requested that the Hospital Board consider paying him $2.5 million in order to terminate all litigation against the Board relating to Dr. Shahawy's staff privileges. Dr. Shahawy and his attorneys have been advised by the mediator that this demand does not come to the Board with the recommendation of the Board's representative, Mr. Bob Strasser.

(Dkt. 291, Ex. 1, ¶ 6). This is clearly only a communication of an offer by Plaintiff, not one by Defendants; further, this document expressly recounts that the Board's representative opposed the offer.

Perhaps realizing that the above-cited document does not support the assertion that the Board actually made such an offer, Plaintiff then goes on to assert that, at least, he believes that the Board authorized a $2.5 million settlement, believes that its counsel failed to communicate said offer to him, and believes that there exists, in the possession of said counsel, a tape recording of the meeting during which the Board made this proposal. However, Plaintiff neither tenders nor identifies any evidence (documentary, affidavit, or otherwise) to support these beliefs.

Lastly, admitting of the possibility that he entirely "misinterpreted" the Board's actions, and thus believed that there was a $2.5 million settlement offer, Plaintiff asserts that the Board at least had offered him $950,000.00 to settle the case. To support this assertion, Plaintiff cites another exhibit — his own Settlement Proposal — which states in pertinent part:

> For the reasons stated [herein], Plaintiff declines the Board's offer to settle this matter for $950,000.00 plus attorney's fees and costs.

(Dkt. 291, Ex. 2, ¶ 5).[7]

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7. Assuming it is correct to speak of such a thing, the overall credibility of this document is questionable. First, the document was clearly drafted to attempt to intimidate Defendants into settling by parading forth every imaginable horror that would result if Defendants did not settle on Plaintiff's terms. Second, several facts and assertions of this document are simply incorrect. For example, at one point this document asserts that "the [Defendants'] multiple

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The foregoing does little to establish either that Defendants made any settlement offers or the amount of those offers. But even assuming that the Defendants did make a $950,000.00 settlement offer, it would be incorrect to place too much emphasis on this fact as regards Plaintiff's civil rights claims. First, although he ultimately lost on his contract claim as well, the Court has not held, and Defendants cannot reasonably assert, that Plaintiff's contract claim was entirely without merit. Such claim was in fact his strongest. But the instant analysis regarding settlement offers focuses on Plaintiff's civil rights claims, as § 1988 only authorizes fee awards under the civil rights statutes. Further, any offer made by the Defendants was made during the course of Court-ordered mediation, and thus should not be weighed so heavily against Defendants who participated therein in good faith. In any event, the Court concludes that this factor weighs more in favor of a fee award than against one.

3. *Whether the Court Held a "Full-Blown Trial on the Merits"*

Defendants note that the Court granted their Rule 50 motions at the close of Plaintiff's case-in-chief and thus assert that this case did not proceed to a "full-blown trial on the merits." Plaintiff maintains the opposite, and asserts that at trial "Dr. Shahawy was able to elicit competent testimony in support of his claims." Defendants are correct.

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motions for summary judgment were decisively denied . . . ." (Dkt. 291, Ex. 2, ¶ 6.e). As the summary judgment Order itself attests, and as set forth herein, such motions were not in fact decisively denied, particularly as regards Plaintiff's civil rights claims.

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While this case did proceed to trial on Plaintiff's civil rights claims, such claims did not receive a "full-blown trial on the merits," as the *Sullivan* case describes it. Rather, at the close of Plaintiff's case-in-chief, all of Plaintiff's remaining civil rights claims were dismissed by the Court and a verdict thereon was directed in favor of Defendants. The Court did so because the evidence presented by Plaintiff fell far short of establishing a prima facie case as to any of his civil rights claims. As noted in *Sullivan*, cases where findings of frivolity have been sustained typically have been decided in the defendant's favor on such a motion. *See Sullivan*, 773 F.2d at 1189. The Court concludes that this *Sullivan* factor weighs significantly in favor of a fee award — not based merely on the fact that Rule 50 motions were granted, but rather because of the strong reasons for which such motions were granted. The scant deposition testimony and averments presented by Plaintiff in opposition to summary judgment on his civil rights claims, which the Court thought were barely sufficient to withstand summary judgment, completely evaporated — or, rather, failed to arise at all — at trial.

The strongest evidence that Plaintiff purported to be able to muster in support of his claims was that of ethnic slurs allegedly used in reference to him, the allegedly altered Board minutes and other records, and Defendants' alleged intimidation of a Board member following her deposition. At trial, the slurs could hardly be recalled, much less attributed to any certain time or any particular individual, much less a Board member; there was no indication that any of the Board's records had been altered in any material way; and the Defendants' alleged attempts to manipulate another

Board member — although perceived by that Board member to be an implicit request to testify falsely — were in fact shown to be well-deserved criticism for her revelation of privileged, statutorily protected knowledge. Last, and most importantly, Plaintiff presented not a shred of evidence of a conspiratorial agreement or any invidiously discriminatory animus.

Rather, the only thread that could be found to draw these ragged elements together into some vague semblance of the alleged conspiracy was rank conjecture: Plaintiff was Egyptian; Plaintiff and the Board had a rancorous past, including litigation; Plaintiff's application was again denied; therefore such denial must have been based on Plaintiff's ethnicity/national origin and/or his speech critical of the Board and SCPH. The voluminous discovery that the parties undertook — which the Court examined and considered in detail at the summary judgment phase — coupled with the express warnings of the summary judgment order provided the Plaintiff with more than sufficient warning of the thin ice on which he would be moving if he continued to press his claims. He did not heed the warning.

4. *Additional Factors Raised by Defendants*

In their fees motions, Defendants preemptively argued against the proposition that Plaintiff's survival of the defense summary judgment motions precluded a fee award. Plaintiff in fact raised this argument as regards the first *Sullivan* factor, although, as set forth above, the Court did not find this fact relevant to the issue of whether Plaintiff established a prima facie case (as opposed to merely establishing a dispute about

an issue of fact material to a prima facie case). The Court believes, however, that this and some related facts merit some further discussion.

The Court has expended a great deal of effort on this case. Such has been required because of the multiple Defendants and multiple claims Plaintiff needlessly brought into this suit, as well as his attempts to use this suit, once filed, as a vehicle to resurrect claims long since expired, waived, litigated to conclusion, or otherwise barred. Furthermore, the centerpiece of Plaintiff's civil rights claims were his § 1985 claims; as set forth in the Court's summary judgment Order, this statute is complex, arcane, and involves some significant unsettled issues of law. All of these issues had to be dealt with as if they were meritorious prior to trial because such is the presumption dictated by fundamental controlling procedural jurisprudence.

As a result of these many complex claims, the significant personal liability that Defendants faced, and their understandable vigorous defense of this case, the Court has been called upon to resolve many complex issues, particularly as regards the contract claim. But, to borrow the language of the Fourth Circuit, this Court's proper, considered exercise of its duties and its generosity in allowing Plaintiff's civil rights claims to go to trial, albeit with a stern warning, does not negate the Plaintiff's responsibility to litigate factually grounded claims. *Cf. Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Furthermore, Plaintiff cannot rely upon the significant effort expended by the Court to argue that his claims were meritorious. To again borrow words from the Fourth Circuit,

> [a]lthough in some instances a frivolous case will be quickly revealed as such, it may sometimes be necessary for defendants to "blow away the smoke screens the plaintiffs ha[ve] thrown up" before the defendants may prevail.

Hutchinson, 994 F.2d at 1081. Such was the case here.

5. *Additional Factors Raised by Plaintiff*

In his memorandum in response to the Defendants' fees motions, Plaintiff has raised several additional factors which he asserts merit consideration. Although none of them is particularly persuasive or availing, some of these additional factors, and the motions to strike they prompted, will be discussed below.

(a) *Insurance policies*

Contemplating that the Defendants will likely seek recovery of a substantial amount of fees, Plaintiff asserts that in exercising its discretion to award fees the Court should consider that "[t]hese defendants are fully indemnified by the hospital, and their share of attorney's fees will likely be paid by the hospital's insurance policy." Defendants respond, in their motions to strike, that no insurance policy is of record and that in, any event, said policy provides "no coverage whatsoever" for the attorney's fees paid by SCPH. Further, Defendants assert that the policy may or may not provide coverage for a portion of the fees incurred in defending the individual Defendants. In his response to the motions to strike, Plaintiff tenders transcripts of two early 1997 Board

meetings, held shortly after the entry of the directed verdict in this case. According to the transcript thereof, at the first meeting one of SCPH's counsel stated that the Board's insurance policy "may provide for reimbursement of some of the attorney fees incurred in connection with the individual's claims . . ." and stated that as of that time, none of the individual Defendants had paid any attorney's fees themselves "because of the indemnity resolution," which is not explained or elaborated upon. According to the transcript thereof, at the second meeting another of SCPH's counsel indicated that there was insurance "coverage . . . to pay fees for members of the board who are sued under the directors policy." Plaintiff thus submits that the Board should tender its insurance policy to the Court for a determination as to whether the individual Defendants have been indemnified pursuant to that policy.

The foregoing does not establish the scope of the asserted insurance coverage. But, even assuming that such coverage exists for all litigation fees incurred by Defendants in this suit, the Court does not believe that the equities would compel declining to award fees. The Court believes that, in the same manner that a personal injury tort defendant is precluded from relying on a plaintiff's receipt of insurance benefits wholly independent from the defendant wrongdoer in order to lessen the damages otherwise due to the plaintiff, Plaintiff herein may not rely on any insurance coverage that Defendants may have had in order to escape a fee award.

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(b) *Prior Litigation by Plaintiff Against Defendants or Their Predecessors*

Plaintiff also asserts that Defendants' references to his prior litigation are irrelevant, immaterial, and legally improper for the purposes of these proceedings. Further, as regards his prior federal court litigation, he asserts that "there was no prior ruling against Dr. Shahawy in the 1980 federal litigation." This statement is not true. As explained below, in addition to his state court litigation, Plaintiff has brought two prior suits in this Court against Defendants or their predecessors, which suits have been mostly unsuccessful.[8]

In *Shahawy v. Elliott*, Case No. 81-545-CIV-T-WC (M.D. Fla.) Plaintiff sued another physician for defamation and intentional interference with contract. This other physician had, based on his prior observation of Plaintiff's performance of cardiac catheterization procedures, made statements to the Board as part of its consideration, and later denial, of Plaintiff's application for privileges to perform such procedures at SCPH. Following a bench trial, this Court found in favor of the defendant therein on all counts, *see Shahawy v. Elliott*, Case No. 81-545-CIV-T-WC (M.D. Fla. Dec. 22, 1982), and was affirmed, *see* 761 F.2d 696 (11th Cir. 1985) (unpublished decision). Plaintiff sought, but

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8. Much of the history of these prior proceedings, including the text of several unpublished decisions, can be found in the appendix to the Defendant Board's Request for Judicial Notice of State and Federal Cases, etc. (Dkt. 214), filed January 3, 1997, a WESTLAW search in the "FL-CS" and "Allfeds" databases using the query "TI(Shahawy)" will provide a more complete list of Plaintiff's prior state and federal court litigation.

was denied, a writ of certiorari to the U.S. Supreme Court. *See* 106 S.Ct. 840 (1986) (unpublished decision).

In *Shahawy v. Harrison et al.*, Case No. 82-1207-CIV-T-WC (M.D. Fla.) Plaintiff again sued over the Board's denial of his application for cardiac catheterization privileges,[9] only this time he sued the Board, certain Board members, the SCPH Director, and various attorneys and doctors, and alleged antitrust, civil RICO, defamation, § 1983, and § 1985 claims. (Plaintiff's § 1985 claims in that suit were also premised on his Egyptian ethnicity and national origin.) Initially on a motion to dismiss, and subsequently on motions for summary judgment, this Court dismissed all of Plaintiff's claims in that suit. *See, e.g., Shahawy v. Harrison et al.*, Case No. 82-1207-CIV-T-WC (M.D. Fla. October 13, 1983). The Eleventh Circuit affirmed the dismissal of the RICO, defamation, § 1983, and § 1985 claims, reversing only the dismissal of the antitrust claims. *See Shahawy v. Harrison et al.*, 778 F.2d 636 (11th Cir. 1985), *appeals after remand*, 875 F.2d 1529 (11th Cir. 1989), 10 F.3d 1049 (11th Cir. 1995). Plaintiff appealed every adverse ruling to the

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9. The Court used the word "again" because in 1980 Plaintiff filed an action in the Circuit Court for Sarasota County Florida against the Board seeking a writ of certiorari to review the Board's denial of his application for cardiac catheterization privileges. Following an appeal to the District Court of Appeals, *see Sarasota County Public Hosp. Bd. v. Shahawy*, 408 So.2d 644 (Fla. 2d DCA 1981), the Circuit Court held that there was competent, substantial evidence to support the Board's decision and thus denied the writ of certiorari, *see Shahawy v. Sarasota County Public Hosp. Bd.*, Civil Action No. 80-3640-CA-01 (Circuit Court for Sarasota County, Florida, Mar. 16, 1982).

U.S. Supreme Court, but was denied certiorari in all instances. *See, e.g., Shahawy v. Harrison et al.*, 516 U.S. 821 (1995).

The Court concludes that this prior course of litigation is relevant and material to consideration of Defendants' entitlement to a fee award. It is clear that Plaintiff has carried on, and continues to carry on, a largely unsuccessful campaign of litigation against the Defendants and their predecessors — virtually all of whom have carried out their duties properly and thereby opposed or thwarted him. In these prior suits, Plaintiff has asserted several claims similar or identical to those he asserted in this suit, including a due process claim based on a property interest in hospital privileges and a § 1985 claim based on his Egyptian descent and national origin. This prior litigation does not lead the Court to, but rather confirms, the conclusion that Plaintiff's civil rights claims in the instant suit were not only without reasonable foundation but were also brought in bad faith, with a malicious motive, as discussed below.

(c) *Miscellaneous*

The remainder of additional matters raised by Plaintiff relate to particular settlement terms proposed during this case (e.g., an injunction prohibiting him from applying for privileges) or other matters (the asserted unbiased account of the court reporter present at the October 1994 Board meeting) that are neither relevant nor material to consideration of a fee award.

Appendix C

C. Bad Faith

In addition to the above finding that Defendants are entitled to a fee award pursuant to the *Sullivan* factors, the Court also determines that Defendants are entitled to a fee award based on Plaintiff's bad faith motives in litigating this case. As the Court has otherwise stated and indicated, Plaintiff's contract claim had an arguable foundation. But the Court is convinced that the remainder of Plaintiff's claims were brought solely to vex and oppress the Board, especially the individual Defendants. It is clear to the Court that Plaintiff, referring to his own situation, spun out nearly every conceivable civil rights claim against the Defendant Board members that could be concocted, and asserted those claims against them in their individual capacities. If Plaintiff could have claimed any other protected status (e.g., age, gender, disability) he would undoubtedly have alleged, discrimination on those grounds as well.

The assertion of charges of discrimination against another on the basis of ones ethnicity or national origin is a serious matter; it should not be reflexive when one happens to fail at a particular endeavor. The assertion of charges of a wide-ranging conspiracy, including document altering and witness tampering by public officials, based on such animus is even more serious. For Plaintiff, these civil rights laws, which exist to ensure equality and fair treatment, were merely sophisticated cudgels he hoped to use to beat the Defendants into submission. From his assertion of individual liability of the Defendant Board members on multiple counts, to his prayer for unspecified punitive damages against those Defendants, to his attempts during trial to obtain over-broad

and unwarranted discovery into several of those Defendants' personal lives and finances, to his attempts to use this suit to resurrect claims over a decade old and already resolved, Plaintiff wantonly asserted his civil rights claims to punish the Defendants and further himself personally. Such abuse merits an appropriate sanction to both punish and deter.

D. Scope of Fees Awarded

As quoted above, § 1988(b) only authorizes attorney's fees awards as to those sections enumerated therein, which include all of Plaintiff's civil rights claims asserted herein. Thus, in filing their memoranda and supporting documentation setting forth the exact amounts sought pursuant to § 1988, Defendants should not include any amounts related to the defense of Plaintiff's Count V contract claim. Alternatively, assuming that it might not be practicable to thusly separate the fees, Defendants may present their overall fees (including those incurred in defending the contract claim) and propose a factor by which to reduce those fees to reflect only the amounts spent defending the civil rights claims. Or Defendants may propose some other method for appropriately reducing the fees sought to reflect only those incurred to defend the civil rights claims.

IV. Conclusion

The Court is entirely mindful of the heightened standard that must be met in order to merit an award of fees in favor of the defendants in a civil rights action. But the Court is firmly convinced, having presided over this case since its inception, that the instant case is the rare one in which fees

are warranted. Not satisfied with the fairly debatable contract claim he had, Plaintiff also conjured up multiple other civil rights claims. In the process, Plaintiff abused not only the laws of this nation but also the jurisdiction of this Court. But for his civil rights claims, subject matter jurisdiction over Plaintiff's contact claim would not have lain in this Court. The civil rights laws were thus used not only to cudgel the Defendants but to foist on this Court claims between a citizen and public entity of the State of Florida which claims involved only issues of concern to the State of Florida: the admission of medical doctors to practice in the public hospitals of this State.

Upon consideration thereof, it is hereby **ORDERED**:

1. Defendant Marilyn J. Lee's Motion to Strike, etc. (Dkt. 286) is **DENIED as moot**.

2. Defendant Sarasota County Public Hospital Board's Motion to Strike, etc. (Dkt. 287) is **DENIED as moot**.

3. Defendant Sarasota County Public Hospital Board's Motion for Determination of Entitlement to Attorney's Fees and Costs (Dkt. 278) is **GRANTED**.

4. The Clerk is **DIRECTED** to tax the Bill of Costs appended as Exhibit "A" to Defendant Sarasota County Public Hospital Board's Motion for Determination of Entitlement to Attorney's Fees and Costs (Dkt. 278).

5. Defendant Marilyn J. Lee's Motion for Determination Regarding Entitlement to Attorneys' Fees Pursuant to 42 U.S.C. § 1988 (Dkt. 279) is **GRANTED**.

6. Defendants Richard Nash, Phyllis Cobb, Martin Moss, and Ruth Hochman's Motion for Determination Regarding Entitlement to Attorneys' Fees Pursuant to 42 U.S.C. § 1988 (Dkt. 280) is **GRANTED**.

7. Defendants shall file their memoranda setting forth the amounts, and supporting documentation, sought pursuant to § 1988 ***on or before May 24, 1999***.

8. Plaintiff shall file his responses thereto ***on or before June 14, 1999***.

9. The originals of these memoranda and responses shall be filed in Tampa.

10. Chambers copies of the above documents, prominently designated as such, shall be provided to the Chambers of the undersigned in Jacksonville.

DONE AND ORDERED, at Jacksonville, Florida, this 22nd day of April, 1999.

s/ Ralph W. Nimmons, Jr.
RALPH W. NIMMONS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 28, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 99-14393-JJ

EL SHAHAWY,

Plaintiff-Appellant,

versus

MARILYN J. LEE, RICHARD NASH, PHYLLIS COBB, MARTIN MOSS, RUTH HOCHMAN, SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: ANDERSON, Chief Judge, MARCUS and KRAVITCH, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

ENTERED FOR THE COURT:

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE